IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JULY 13, 2006 Session

MICHAEL DAVENPORT v. RICK BATES d/b/a RB AUTO SALES

Direct Appeal from the Circuit Court for Davidson County
No. 04C-2924 Walter Kurtz, Judge

No. M2005-02052-COA-R3-CV - Filed on December 12, 2006

This case involves the repossession of two vehicles – a car and a truck. The buyer sued the seller claiming that he had repossessed the vehicles in violation of the sales contracts and violated the Tennessee Consumer Protection Act, and he sought punitive damages. The seller counterclaimed that the buyer had first breached their contract by making late payments. The trial court directed a verdict in the seller's favor on the Consumer Protection Act claim and the request for punitive damages. The court also directed a verdict for the seller on the issue of wrongful repossession of the truck because the buyer had told the seller to take the truck. A jury found that the car was wrongfully repossessed because the seller had routinely accepted the buyer's late payments, and he had thereby waived his right to repossess for late payments. The jury also found that, after repossession, the seller had not provided written notice to the buyer before he resold the vehicles. As a result, the trial court ordered the seller to pay a statutory penalty to buyer which is available in "consumer goods" transactions. The court also awarded damages to the buyer for the wrongful repossession of the car. After the jury determined the fair market value of the car when it was repossessed, the trial court awarded the buyer damages for the difference in the car's value and the amount the buyer still owed. The sale of the truck did not produce enough money to cover what the buyer had owed on it. The jury determined the deficiency existing on the truck to be awarded to the seller. The trial court incorporated all these damage awards into a final award to the buyer. On appeal, the seller contends that he did not wrongfully repossess the car because the sales contract specifically provided that he could waive any default without impairing his right to declare a subsequent default. Also, he argues that the evidence does not support the jury's finding that he did not send the required notices before he sold the vehicles. In addition, he claims that the evidence does not support a finding that the car was bought in a "consumer goods" transaction because the buyer testified that he used it in his business. He also challenges the jury's valuation of the fair market value of the car and the deficiency owed on the truck. The buyer claims that the trial court erred in directing a verdict on his Tennessee Consumer Protection Act claim. For the following reasons, the trial court's judgment is affirmed as modified.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Thomas J. Drake, Jr., Nashville, TN, for Appellant

Kirk L. Clements, Goodlettsville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On May 1, 2000, Michael Davenport ("Buyer" or "Appellee") purchased a 1995 Chevrolet Corvette from Rick Bates d/b/a RB Auto Sales ("Seller" or "Appellant"). The Corvette was purchased pursuant to a written contract which provided that Buyer would make monthly payments to Seller, and Seller would retain a security interest in the vehicle. The payments were to be made over a five year period with an annual percentage rate of 11.45%. The total purchase price of the vehicle, with interest, was $30,402.93. Payments were to be made on the first day of the month, and if any payment was more than two days late, Buyer would incur a late charge of $10.00 per day. The contract also provided, in pertinent part, that:

> If any installment of this note is not paid when due, the entire amount unpaid shall be due and payable at the election of the holder hereof, without notice. All parties hereto . . . hereby waive demand, notice and protest.
>
> . . .
>
> Upon default, all sums secured hereby shall immediately become due and payable at Seller's option without notice to Buyer, and Seller may proceed to enforce payment of same and to exercise any or all rights and remedies provided by the Uniform Commercial Code or other applicable law. . . .
>
> Seller may waive any default before or after the same has been declared without impairing his right to declare a subsequent default hereunder, this right being a continuing one.

The contract also stated that Buyer was to purchase comprehensive insurance on the vehicle and furnish evidence of the policy to Seller within ten days. The contract was signed by both parties and dated May 1, 2000.

Buyer is a self-employed landscaper, and he testified that the Corvette was used in his landscaping business. Though he obviously did not use it to haul materials, he explained that he "went and looked at jobs in it, went and collected money in it, and went and done proposals in it, things like that." One of his landscaping employees was paid to keep the car clean. Buyer also attempted to insure the Corvette under a commercial insurance policy, but for unknown reasons, the policy was never issued. He provided documentation of his commercial insurance application to Seller.

On April 1, 2003, Buyer purchased another vehicle, a 1997 Chevrolet Silverado "dually," from Seller. This truck was used in Buyer's landscaping business to carry materials. Buyer signed another contract with provisions identical to those mentioned above, except that payments were to be made over a period of four years with a 10% annual percentage rate. The total price to be paid for the truck, including interest, was $18,029.50.

Over the course of three and a half years, Buyer made several late payments and some partial payments to Seller. Buyer testified that he was often "tight on money" because of the nature of his work, but Seller would work with him on his payment schedule. Buyer stated that he never paid any late charges and was never asked to pay late fees by Seller. According to Buyer, there was never any problem with his making payments late. Seller, on the other hand, claimed that he told Buyer from the beginning that he had to make payments on time. Seller testified that he would tell Buyer about applicable late fees, and Buyer would simply state that he refused to pay them. Seller claimed that he pleaded with Buyer on numerous occasions to "do right" and make his payments. However, Seller admitted that no late fees were actually charged to Buyer's account until November of 2003.[1]

On January 1, 2004, Buyer called Seller to say that he would be unable to make his January payments on time. Buyer was current on his payments through December of 2003, but he had made no payments toward accrued late fees. He also maintained no insurance on either vehicle. According to Buyer, he informed Seller that he would be in to make the payments on the following Friday, which was January 9th, and Seller did not appear to have any problem with that arrangement. Seller, on the other hand, testified that Buyer called and said not to call him about that month's payment because he had not been working. He claims Buyer only said that he would get there when he could. At that point, according to Seller, he informed Buyer that "it [was] over," he would no longer tolerate the late payments and was sending someone to repossess the car.

The Corvette was repossessed on January 6, 2004. Buyer claims he knew nothing about Seller's plans to repossess until he got home and the car was gone. Seller testified that when his agent attempted to repossess the car, it would not even start. The car had to be towed back to the lot, where Seller discovered further repairs that were necessary before the car could be resold. Buyer

[1] At some point, the parties had a disagreement about landscaping work that Buyer had done at Seller's home. The argument appears to have affected their other dealings, and the situation involving the vehicles progressively worsened.

called Seller and demanded to know the full "payoff" amount he was required to pay in order to get the car back. According to Buyer, Seller replied that he was unsure of the amount and would have to check with the bank which had financed the loan. Seller asked Buyer about the truck payment, and Buyer responded that he intended to pay the current payments owing on it as well. At some point, Buyer went to Seller's car lot to discuss the vehicles. At that time, Buyer did not present any money to pay off the car or to make a payment on the truck, but he claims that he could have borrowed funds from a friend if he had known the actual amount needed. He secretly taped the parties' conversation, and the cassette tape was entered as an exhibit in the trial court and played for the jury. When Seller again mentioned the dually during that conversation, Buyer responded, "you can repo that dually any day you want to repo it." With the help of the Sumner County Sheriff's Department, Seller eventually located and repossessed the truck, which had been wrecked.[2]

Seller subsequently resold both vehicles, receiving $12,500 from a wholesaler for the Corvette and $8,000 for the truck. At trial, conflicting evidence was presented regarding whether Seller notified Buyer of these sales. Buyer claims he never received notice of either sale, nor did he receive an explanation of whether a deficiency or surplus remained after the sale. Seller testified that it was his policy to send a letter of notice to a customer ten days prior to a sale of the customer's repossessed vehicle. He also acknowledged his policy of providing notice of any surplus or deficiency existing upon sale. Seller claimed that he complied with these policies in dealing with Buyer. According to his testimony, he sent the appropriate letters to Buyer's home address, but the letters were returned to him. When asked about the current location of these notices, Seller stated that he had provided the originals to Buyer's former attorney, and Seller had no copies. However, upon re-examination, Seller acknowledged his inconsistent deposition testimony, in which he had stated that no notice was given to Buyer prior to the sale.

Buyer had made payments on the Corvette over the course of three and a half years totaling approximately $22,700.00, leaving a balance of $7,624.61 owing at the time of repossession according to the balance shown on his last payment receipt. Prior to the sale, Seller performed repairs on the car in the amount of $847.00. Seller then resold the Corvette for about $12,500.00 wholesale. It is undisputed that Seller retained money from the sale beyond what he was owed on the car, and Buyer never received that "surplus."

Buyer had paid on the truck for approximately eight months and still owed approximately $13,380.60 at the time of its repossession according to his last receipt. In addition, Seller incurred about $1,500.00 in repairing the vehicle Seller received $8,000.00 from the sale of the truck. This left an estimated deficiency of about $6967.00, according to Seller's figures. However, the parties

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[2] Buyer testified that around the end of 2003 or the first of 2004, he was unloading the truck on a hill and inadvertently failed to properly shift the vehicle into park. As a result, the truck rolled down the hill resulting in damage. Buyer took the truck to a repair shop for a preliminary estimate of the cost to repair the damages. An estimate of $6,585.99 was provided on January 9, 2004. Seller claimed that Buyer had admitted wrecking the truck on a curve one night. Seller also testified that the truck appeared to have been "stripped," as it was missing the tailgate, the battery, and a mirror, in addition to its other damages, which included a cracked windshield and one whole side of the truck being smashed in.

disputed whether the amount Buyer still owed should be reduced to reflect the amount of interest that was charged for the original four-year loan. Buyer argued that because the vehicle was repossessed early, he should not be required to pay the full interest charge.

Buyer first brought suit against Seller in the Metropolitan General Sessions Court of Davidson County by obtaining issuance of a civil warrant on February 24, 2004. Seller filed a counterclaim against Buyer on May 3, 2004. However, both claims were dismissed at trial on September 29, 2004. Buyer filed an appeal bond on October 5, 2004, and subsequently requested a jury trial.

Buyer filed an amended complaint in the Circuit Court for Davidson County on January 11, 2005, alleging that Seller repossessed the vehicles in violation of the sales contracts, violated the Tennessee Consumer Protection Act, and engaged in intentional and outrageous conduct entitling Buyer to punitive damages.[3] Buyer's request for relief included: compensatory damages; costs, interest, and attorney's fees; discretionary costs; punitive damages; treble damages; and statutory damages pursuant to Tenn. Code Ann. § 47-9-625, which provides remedies to a buyer if a secured party fails to comply with proper procedures upon a buyer's default.[4]

Seller's answer stated various defenses. Relevant to this appeal, he claimed that Buyer had breached the parties' contracts by failing to make payments. Additionally, Seller included a counterclaim for payment of the balance owing under the two contracts.

Buyer's answer to Seller's countercomplaint asserted that Seller was barred from recovery under the doctrine of equitable estoppel because he frequently allowed Buyer to make late payments without consequence. Also, Buyer claimed that Seller could not recover because he failed to comply with the proper procedures for repossession under Tennessee law. He also cited other defenses which are not relevant to this appeal.

At trial, which was held April 19-20, 2005, Buyer testified about the parties' transactions. In addition, he presented the testimony of another local car dealer regarding the value of the vehicles and testimony about the Corvette's condition from Buyer's girlfriend and one of Buyer's landscaping employees. The jury subsequently heard testimony from Seller, two of Seller's employees, and a local auto mechanic who repaired the Corvette after repossession. Seller moved for and was granted a directed verdict on the causes of action for outrageous conduct and punitive damages, violation of

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[3] Although Buyer's complaint alleged that Seller "fail[ed] to act in a commercially reasonable manner as required by T.C.A. § 47-9-607," his counsel stated at trial that he was not raising an issue of whether the *sale* after repossession was commercially reasonable. Instead, Buyer contended that the repossession of the vehicle itself was not commercially reasonable.

[4] A second amended complaint was filed on January 20, 2005. The parties agreed that Buyer could amend his original amended complaint because it appears that the previous complaint misstated Seller's name in its factual allegations. Therefore, a second amended complaint was filed, amending the factual allegations but alleging the same grounds for the complaint.

the Tennessee Consumer Protection Act, and wrongful repossession of the truck. The court found that Buyer had voluntarily surrendered the truck by basically telling Seller to go get it.

The trial court charged the jury and submitted five interrogatories to be answered, as follows, in pertinent part:

> A. Statutory Damages
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> 1. Did [Seller] notify [Buyer] by mail at his last known address that the Corvette would be sold at a certain time and place prior to the resale of the repossessed Corvette?
> 2. Did [Seller] notify [Buyer] by mail at his last known address that the pick-up truck would be sold at a certain time and place prior to the resale of the repossessed truck?
>
> B. Wrongful Repossession
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> 3. Did [Seller] waive the right to repossess the Corvette for late payment? (If you answered "Yes" to this Question, please proceed to Question 4.)
> 4. What was the fair market value of the Corvette in January 2004?
>
> C. Counterclaim for Deficiency
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> 5. The defendant-counterclaimant is entitled to recover the deficiency owed on the pickup truck. You are to determine that amount by determining the amount still owed at the time of repossession plus the cost of repossession, plus the cost of repair, less the amount for which it was sold.

The jury found that Seller had not provided notice to Buyer before the sale of either vehicle. The jury also concluded that Seller had waived the right to repossess the Corvette for late payment. The jury determined that the fair market value of the Corvette at the time of repossession was $17,500, and the deficiency on the pick-up truck was valued at $6,328.14.

On May 6, 2005, the trial court entered an order based on the jury's factual findings. Buyer was awarded $7,777 statutory damages for Seller's failure to provide proper notice of the sale of the Corvette and $4,385 statutory damages for Seller's failure to provide proper notice of the sale of the truck. These statutory damages were calculated pursuant to Tenn. Code Ann. § 47-9-625(c)(2) for "consumer goods" collateral. In addition, Buyer was awarded $9,875.39 for the "surplus" existing after the sale of the Corvette. The court took the jury's deficiency figure of $6,328.14 that Buyer still owed on the truck and subtracted a $4,500 "surplus" that Seller had received from the sale of the Corvette beyond the amount Buyer still owed. This left an award of $1,828.14 to Seller, which was offset against the awards to Buyer. The award totaled $20,209.25 to be paid by Seller, plus court costs.

On June 3, 2005, Seller filed a motion to alter or amend the judgment, or in the alternative, to grant a new trial. Relevant to this appeal, Seller contended that the issue of waiver of the right to repossess should not have been submitted to the jury because the contract specifically provided that Seller could waive any default without impairing his right to declare a subsequent default. He also challenged the jury's determination of the Corvette's fair market value, which was used to determine the damage award for wrongful repossession, and he challenged the jury's calculation of the deficiency remaining on the truck.

In addition, Seller argued that the weight of the evidence did not support the jury's finding that he had failed to provide notice prior to the sale of the vehicles, and therefore, no statutory damages were appropriate. Alternatively, Seller challenged the court's award and calculation of statutory damages. The court had calculated those damages according to the statute's provision for "consumer goods" transactions. Buyer had testified that both the car and the truck were used in his landscaping business. Seller also claimed that the present "consumer-goods" calculation of damages had been improperly determined with regard to the amount of the credit service charge to be included. He finally claimed that the weight of the evidence did not support the total award of $20,209.25.

Buyer subsequently filed a motion to alter or amend, requesting attorney's fees pursuant to the Tennessee Consumer Protection Act and prejudgment interest. He also moved for discretionary costs pursuant to Tenn. R. Civ. P. 54.

On July 25, 2005, the trial court entered an order on the parties' post-trial motions. Seller's motion for a new trial was denied, and his motion to alter or amend the judgment was denied in part and granted in part. The court withdrew the $4,385 statutory damages for consumer collateral in regard to the truck, which reduced the total judgment against Seller to $15,824.25. Buyer's motion requesting attorney's fees pursuant to the Tennessee Consumer Protection Act was denied, but his motion for discretionary costs was granted. Seller was ordered to pay $1200 discretionary costs to Buyer. Seller timely filed his appeal to this Court on August 22, 2005.

II. ISSUES PRESENTED

Appellant presents the following issues, as we perceive them, for review:

1. Whether the trial court erred in ruling that a factual issue existed as to whether Seller could waive the right to repossess the Corvette for late payment, where the contract specifically said no rights were waived;
2. Whether there is any material evidence to support the jury's finding that Seller did not give notice of the sales;
3. Whether the transaction involving the 1995 Chevrolet Corvette was a commercial transaction;

4. Whether the trial court erred in granting statutory damages based on the entire finance charge to be paid, where the proper measure is the amount of finance charge which had been paid;
5. Whether the damage for wrongful repossession of the Corvette was the difference between the sale price, $12,500, and the balance owed, $7,624;
6. Whether the deficiency on the truck was $6,967.38 rather than $6,328.14 as determined by the jury.

Additionally, Appellee presents the following issue for review:

7. Whether the trial court properly directed a verdict on Buyer's Tennessee Consumer Protection Act claim.

For the following reasons, the decision of the circuit court is affirmed as modified.

III. STANDARD OF REVIEW

This Court will set aside a jury's findings of fact only if there is no material evidence to support the verdict. Tenn. R. App. P. 13(d). "When addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence." ***Whaley v. Perkins***, 197 S.W.3d 665, 671 (Tenn. 2006) (citing *Crabtree Masonry Co., Inc. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978); *Black v. Quinn*, 646 S.W.2d 437, 439-40 (Tenn. Ct. App. 1982)). Appellate courts do not reweigh the evidence, nor do we decide where the preponderance of the evidence lies. ***Crabtree***, 575 S.W.2d at 5. If there is any material evidence to support the verdict, it must be affirmed, or else the parties would be deprived of their constitutional right to a trial by jury. ***Id.***

We review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness for the trial court's conclusions. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Wrongful Repossession

According to Seller, the trial court erred in denying his motion for a directed verdict on the issue of wrongful repossession of the Corvette. Seller contends that no factual issue existed regarding his right to repossess upon late payment, and, therefore, the trial court erred in allowing the jury to determine whether Seller had waived his right to repossess. The parties' contract stated that "Seller may waive any default before or after the same has been declared without impairing his right to declare a subsequent default . . . ."

In ruling on a motion for directed verdict, "the court must take the strongest legitimate view of the evidence in favor of the non-moving party." ***Conatser v. Clarksville Coca-Cola Bottling Co.***, 920 S.W.2d 646, 647 (Tenn. 1995). "In other words, the court must remove any conflict in the evidence by construing it in the light most favorable to the non-movant and discarding all countervailing evidence." ***Id.*** A motion for directed verdict should be granted only if, after assessing the evidence according to the foregoing standards, the court determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. ***Id.*** (citing *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn.1994)).

On review of a trial court's ruling on a motion for directed verdict, an appellate court does not reweigh the evidence. ***Conatser***, 920 S.W.2d at 647, (citing *Williams v. Brown*, 860 S.W.2d 854, 857 (Tenn.1993)). Instead, we also must "take the strongest legitimate view of the evidence in favor of the [non-movant], indulging in all reasonable inferences in his favor, and disregarding any evidence to the contrary." ***Id.*** The motion should have been granted only if there is no material evidence in the record that would support a verdict under the theories that were advanced. ***Id.***

The issue then, for this Court, is whether the record contains any material evidence supporting Buyer's cause of action for wrongful repossession. It is undisputed that Seller did accept Buyer's late payments and did not charge late fees to Buyer's account for the first three years of the contract. Buyer was current on his monthly payments through the end of 2003, but he had not paid any late fees. He also did not maintain insurance on the car, but Seller had never before declared him in default on this basis. When Buyer called Seller on January 1, 2004, to inform Seller that he would not be able to make his January payment on time, Seller repossessed the vehicle. Buyer claims that Seller had waived his right to repossess the vehicle for late payments by establishing a course of accepting his payments late. Seller argues that the contract does not allow such a waiver of the right to repossess for late payments.

The Tennessee Supreme Court has addressed the waiver issue in a case involving a real estate foreclosure. ***Lively v. Drake***, 629 S.W.2d 900 (Tenn. 1982). In *Lively*, the Court affirmed a trial court's decision to enjoin a mortgagee from foreclosing on a deed of trust. ***Id.*** at 904. The mortgagee had accepted irregular payments over a period of two years, and the mortgagors had become five months behind in scheduled payments. ***Id.*** at 903. The mortgagee finally decided to accelerate the maturity of the note and to commence foreclosure. ***Id.*** However, he did not communicate with the mortgagors prior to declaring a default. ***Id.*** at 902. The Court noted it was settled law in Tennessee that "as a result of a course of dealing between parties, the holder of an indebtedness may be deemed to have waived the right to accelerate without giving prior notice to the debtor of his intention to do so."[5] ***Id.*** at 903. The Court then concluded that:

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[5] When a secured party has accepted payments late, but then wishes to declare a default upon further late payments, he may send the debtor a "strict compliance" letter to demand compliance with the original terms of the agreement. Robert M. Lloyd, *Wrongful Repossession in Tennessee*, 65 Tenn. L. Rev. 761, 765 (1998). This informs the debtor that even though late payments may have been accepted on previous occasions, the secured party will proceed to repossess the collateral if further payments are untimely. ***Id.*** The secured party's waiver of the original terms is (continued...)

> the course of dealing between the parties over a period of almost two years was such that appellants had been led to believe that irregular payments would be accepted without acceleration. Under those circumstances appellee should not be permitted to foreclose on the note without first calling attention of appellants to the fact that he was insisting upon the original terms, and that no further irregular payments would be accepted.

Id. at 904. Although *Lively* involved a real estate foreclosure, the Court's reasoning has also been applied in wrongful repossession cases. ***See Crowe v. First Am. Nat'l Bank***, No. W2001-00800-COA-R3-CV, slip op. at 4-5 (Tenn. Ct. App. W.S. Dec. 10, 2001). A secured party may also be deemed to have waived its right to insist on prompt payment if it has established a course of accepting late payments. Robert M. Lloyd, *Wrongful Repossession in Tennessee*, 65 Tenn. L. Rev. 761, 764 (1998).

In order for *Lively*'s "waiver" reasoning to apply to these facts, an accepted course of conduct or dealing must have been established by the parties, and also, the debtor must have relied on that course of conduct in his further dealings. ***Jerles v. Phillips***, No. M2005-1494-COA-R3-CV, slip op. at 13 (Tenn. Ct. App. W.S. at Nashville Aug. 22, 2006); ***Dacus v. Weaver***, Shelby Equity No. 29, 1988 WL 138918 at *2 (Tenn. Ct. App. W.S. Dec. 28, 1988). In this case, there is material evidence in the record to support a finding that the parties had established a course of dealing in which late payments were routinely accepted. Regarding the debtor's reliance, we have previously refused to apply *Lively* in situations in which a debtor stops making payments altogether, as opposed to making irregular payments. ***See Jerles***, slip op. at 13; ***Dacus***, 1988 WL 138918 at *2. In other words, "it cannot reasonably be said that [a debtor] relied on [a creditor's] acceptance of late payments when making no payment at all." ***Dacus***, 1988 WL 138918 at *2. In this case, however, Buyer had not stopped making payments altogether. In fact, he was current on his payments up through the previous month. He merely called on the day his next payment was due to say he would be late. This is a case of "irregular payment," like *Lively*, rather than a case of "nonpayment." There is ample evidence in the record to support a finding that Buyer was relying on Seller's pattern of accepting his payments late. Therefore, the evidence supports a finding that Seller had waived his right to repossess for late payments.

Seller contends that, despite the fact that he had accepted Buyer's irregular payments, the clause in their contract providing that he could still declare a subsequent default controls, and he could still proceed to repossess the vehicle upon further late payment. Secured parties often include "antiwaiver" or "non-waiver" clauses in their original agreements, stating that the failure of the secured party to exercise its remedies on one default will not waive the right to exercise rights on subsequent defaults. Lloyd, *supra*, at 767. The contract in the case at bar included this type of "non-

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[5](...continued)
thereby retracted. ***Id.*** In this case, no such letter was sent to Buyer to demand strict compliance with the monthly deadline.

waiver" clause. (Exhibit 1). Courts in other jurisdictions have refused to give effect to these clauses, finding that the secured party's conduct created an estoppel, or the secured party waived the non-waiver clause, or that non-waiver clauses are invalid and against public policy. ***Id.*** (mentioning *In re Bagley*, 6 B.R. 387, 390 (Bankr. N.D. Ga. 1980); *Montgomery Enter., Inc. v. Atlantic Nat'l Bank*, 338 So. 2d 1078, 1081 (Fla. Dist. Ct. App. 1976); *Pierce v. Leasing Int'l, Inc.*, 235 S.E.2d 752, 754 (Ga. Ct. App. 1972); *Cobb v. Midwest Recovery Bureau Co.*, 295 N.W.2d 232, 237 (Minn. 1980); *Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869, 874 (10th Cir. (Okla.) 1981); *Smith v. General Fin. Corp.*, 255 S.E.2d 14, 15 (Ga. 1979); *Battista v. Savings Bank*, 507 A.2d 203 (Md. Ct. Spec. App. 1986)). Tennessee has a statute addressing these clauses, which states:

> (c) If any such security agreement, note, deed of trust, or other contract contains a provision to the effect that no waiver of any terms or provisions thereof shall be valid *unless such waiver is in writing*, no court shall give effect to any such waiver *unless it is in writing*.

Tenn. Code Ann. § 47-50-112 (2001) (emphasis added). However, the statute does not address the effect of general non-waiver clauses which completely prohibit any type of waiver.

There is no indication in *Lively* of whether the contract at issue contained a non-waiver clause. 629 S.W.2d 900, 901-904. However, we have previously found that a bank waived its right to repossess for late payment even though a non-waiver clause was included in the parties' contract. In ***Crowe v. First Am. Nat'l Bank***, No. W2001-00800-COA-R3-CV, slip op. at 4-5 (Tenn. Ct. App. W.S. Dec. 10, 2001), a case analogous to the one before us, the parties' contract provided that:

> The Creditor can delay or refrain from enforcing any of its rights under this contract without losing them. For example, the Creditor can extend the time for making some payments without extending others. Any change in terms of this contract must be in writing and signed by the Creditor.

Id. at 2. The course of dealing between the parties during a period of over three years was such that the debtor had been led to believe that the bank would accept late payments without considering him in default. ***Id.*** at 4. The bank had never refused the debtor's late payments before, and it had not notified the debtor that future late payments would not be accepted. ***Id.*** Also, debtor had never properly insured the truck as required by their contract, but the bank had never placed him in default. ***Id.*** When the debtor was late on another payment, the bank proceeded to repossess his truck. ***Id.*** The creditor moved for a directed verdict on the issue of wrongful repossession, but we concluded that the trial court had correctly overruled the motion. ***Id.*** The bank had waived its right to declare a default for late payments, and it had not taken any action to retract its waiver.

In his brief, Seller cites two cases in which the Tennessee Court of Appeals had determined there was no waiver of creditors' rights to declare a default. ***Spectra Plastics, Inc. v. Nashoba Bank***, 15 S.W.3d 832, 842 (Tenn. Ct. App. 1999); ***Vantage Fin. Corp. v. McNiel***, No. M2002-00047-COA-R3-CV, slip op. at 3 (Tenn. Ct. App. M.S. Jan. 7, 2003). However, we find

the two cases are distinguishable to the case at bar. In *Spectra*, the court refused to find a waiver of contract rights when the contract specifically provided that its terms could not be modified except in writing. 15 S.W.3d at 842. The court reasoned that the "no oral modification" clause should be enforced according to Tenn. Code Ann. § 47-50-112(c) (2001), which we have previously discussed. ***Id.*** The contract at issue in this case does not contain a "no oral modification" clause. (Exhibit 1). It contains a general non-waiver clause which is not addressed by Tenn. Code Ann. § 47-50-112(c) (2001).

In the other case Seller mentions, *Vantage*, the debtor had not made any payments for over a year. Slip op. at 2. His promissory note was assigned to another creditor, who made a demand for payment. ***Id.*** The debtor still did not pay. ***Id.*** The court stated that a course of conduct of accepting late payments "does not excuse [the debtor's] failure to make *any* payments . . . when [the creditor] made demand for payment." Slip op. at 3 (emphasis added). The court's reasoning was similar to that employed in ***Jerles***, slip op. at 13, and ***Dacus***, 1988 WL 138918 at *2. Although a pattern of accepting late payments may prevent the creditor from immediately repossessing a vehicle upon a further late payment, the pattern of paying late does not justify a debtor's complete refusal to make any payment. In this case, Buyer did not refuse to pay altogether, and Seller made no demand for payment. Seller repossessed the Corvette when Buyer called to say he would be late. Therefore, this case is not analogous to either of the cases cited by Seller.

In sum, we find sufficient material evidence in the record to support Buyer's claim for wrongful repossession of the Corvette. The evidence supports a finding that Seller had waived his right to insist on prompt payment, Buyer had relied on that course of conduct, and Seller took no action to retract his waiver of the original terms. At the very least, reasonable minds could differ as to whether Seller waived his right to repossess for late payments. Therefore, the trial court properly denied his motion for a directed verdict.

B. Notice prior to Sales

A secured party that disposes of collateral must send a reasonable authenticated notification of disposition to the debtor. Tenn. Code Ann. § 47-9-611(b) (2001). The timeliness, content, and form of the notice are addressed by Tenn. Code Ann. § 47-9-612 – 613 (2001). The provision for notice prior to a sale is intended to afford the debtor a reasonable opportunity to avoid the sale altogether by redeeming the collateral, or in case of sale, to see that the collateral brings a fair price. ***R & J of Tenn., Inc. v. Blankenship-Melton Real Estate, Inc.***, 166 S.W.3d 195, 203 (Tenn. Ct. App. 2004). On appeal, Seller asserts that there is no material evidence to support the jury's finding that Seller did not give notice of the sales. Seller testified that it was his policy to send a notice letter to a customer ten days prior to the sale of their repossessed vehicle. He claimed that he sent the appropriate letters to Buyer, but the letters were returned because Buyer would not accept his mail.[6]

[6] When addressing this issue in his brief, Seller also refers to the testimony of one of his employees, who stated that he had called Buyer on numerous occasions to inform him of late fees he had incurred. Seller also states that he (continued...)

He did not produce copies of any such letters because he allegedly sent the originals to Buyer's former attorney.

Buyer claimed he never received notice of either sale. Upon re-examination of Seller, Buyer's counsel introduced deposition testimony in which Seller admitted he had never provided notice of the sales to Buyer. Seller then explained that he was told not to contact Buyer directly, but only to communicate through their attorneys. He stated that a notice letter was sent to Buyer's attorney, and it was refused by both the attorney and Buyer. Still, no copy of any notice letter was produced.

Given the testimony in the case at bar, material evidence existed to support the jury's finding that Seller did not send the required notices. Reconciling conflicting testimony between the parties and evaluating witnesses' credibility are responsibilities for the jury. ***Sasser v. Averitt Exp., Inc.***, 839 S.W.2d 422, 427 (Tenn. Ct. App. 1992). This Court does not have the same opportunity to observe witnesses, and we will not reevaluate their credibility. ***Id.*** Rather, we accord great weight to the jury's verdict. ***Id.*** Buyer's testimony, along with the inconsistent testimony of Seller, constituted sufficient evidentiary support for the jury's conclusion that no notices were sent.

C. Damages

1. Consumer or Commercial Transaction

When a secured party fails to comply with the statutory notice requirements, the debtor may recover damages for its loss. Tenn. Code Ann. § 47-9-625 (2001). However, if the collateral is "consumer goods," the debtor is entitled to recover a minimum statutory penalty without regard to his actual loss or his ability to prove that he has been damaged at all. ***Davenport v. Chrysler Credit Corp.***, 818 S.W.2d 23, 31 (Tenn. Ct. App. 1991). The consumer debtor may recover an amount not

[6](...continued)
personally told Buyer to make payments on time or else he would be charged late fees. However, this evidence does not appear to be relevant to the issue of whether Seller provided the required notice *following repossession before disposition of the collateral* in accordance with Tenn. Code Ann. § 47-9-611-- 613.

less than 10% of the cash price plus the time-price differential.[7] Tenn. Code Ann. § 47-9-625(c)(2).

The trial court awarded statutory damages to Buyer for Seller's failure to notify him of the sales pursuant to Tenn. Code Ann. § 47-9-625(c)(2) (2001) for "consumer goods" collateral . (Vol.I, p.84). Initially, the award included $7,777 regarding the sale of the Corvette and $4,385 regarding the truck. On Seller's motion to alter or amend, the trial court withdrew the award for the truck, apparently concluding that it was not a "consumer goods" transaction. The court did not alter the $7,777 statutory damage award regarding the Corvette.

On appeal, Seller argues that the trial court erred in calculating damages for a "consumer goods" transaction because Buyer himself testified that he used the Corvette in his landscaping business. As previously discussed, the trial court submitted to the jury the issue of whether notice was properly given. However, the court did not submit an interrogatory asking whether the transaction was consumer or commercial in nature. Although the parties did not challenge the manner in which the trial court proceeded on this issue, we must address it in order to ascertain the correct standard of our review. In secured transactions cases, there has been a divergence of opinion as to whether the classification of collateral is a question of law or a question of fact. ***See McFarland v. Brier***, 850 A.2d 965, 976 (R.I. 2004); ***First Nat'l Bank in Grand Prairie v. Lone Star Life Ins. Co.***, 524 S.W.2d 525, 533 (Tex. Civ. App. 1975); ***Matter of Newman***, 993 F.2d 90, 93 (5th Cir. (Tex.) 1993) ("Classification of collateral under the UCC is a question of law"). ***But see Morgan County Feeders, Inc. v. McCormick***, 836 P.2d 1051, 1053 (Colo. App. 1992); ***Zeagler v. Custom Auto, Inc.***, 880 F.2d 1284, 1286 (11th Cir. (Ala.) 1989) (concluding that in borderline cases involving whether good is "consumer good," determination is best made by trier of fact). Although there appear to be no reported cases from Tennessee courts addressing this issue, and the parties have not cited any, the "Tennessee Pattern Jury Instructions" provide some guidance. The Pattern Jury Instruction regarding "Wrongful Sale After Repossession" sets out the two alternative damage calculations for commercial and consumer transactions. 8 Tenn. Practice: Tenn. Pattern Jury Instructions - Civil § 14.71 (6th ed. 2006). The Instruction is followed by a "Use Note," which provides: "[t]he determination of whether the secured property is equipment or consumer goods is

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[7] Tenn. Code Ann. § 47-9-625(c)(2) (2001) actually reads:

> if the collateral is consumer goods, a person that was a debtor or a secondary obligor at the time a secured party failed to comply with this part may recover for that failure in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the obligation or the time-price differential plus ten percent (10%) of the cash price.

The section does not define the terms "credit service charge," "time-price differential," and "cash price." According to the comments following the text, the construction and application of the terms are left to the court. Tenn. Code Ann. § 47-9-625 official comment 4. However, "[c]ase law and scholarly commentary reveal that application depends on whether the debtor received credit from the seller or a third-party financer." Timothy R. Zinnecker, *The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part II*, 54 Bus. Law. 1737, 1804 (1999). If the seller himself extended credit to the buyer, as in this case, then we use the formula including the time-price differential plus ten percent of the cash price. ***Id.*** "Time-price differential" is defined by Black's Law Dictionary as: "[a] figure representing the difference between the current cash price of an item and the total cost of purchasing it on credit." *Black's Law Dictionary* (8th ed. 2004).

a question of law and the trial judge will select" which calculation is applicable. ***Id.*** In this case, the trial judge's actions were in accordance with the Pattern Jury Instructions. Although we recognize that the Pattern Jury Instructions are meant to be an aid and are not mandatory authority, ***See Cortazzo v. Blackburn***, 912 S.W.2d 735, 740 (Tenn. Ct. App. 1995), we find that the trial judge proceeded properly in treating the issue as a question of law and selecting which damage calculation applied to this collateral.

We will next consider the trial judge's conclusion that the Corvette transaction involved "consumer goods." If the Corvette is considered "consumer goods," Buyer is entitled to the sizeable statutory penalty. As previously noted, we review a trial court's conclusions of law under a *de novo* standard upon the record with no presumption of correctness for the trial court's conclusions. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993) (citation omitted).

In secured transactions, collateral is defined by its type of primary use in the hands of the debtor. ***Walker v. Assoc. Commercial Corp.***, 673 S.W.2d 517, 522 (Tenn. Ct. App. 1983). "Consumer goods" are defined as "goods that are used or bought for use primarily for personal, family, or household purposes." Tenn. Code Ann. § 47-9-102(a)(23) (2001). "Of course, broadly speaking, every buyer is a 'consumer.'" ***Int'l Harvester Credit Corp. v. Hill***, 496 F.Supp. 329, 333-34 (M.D.Tenn. 1979). However, the fact that an item is personally used does not mean it was for "personal use." ***Id.*** at 334.

At trial, various witnesses gave lengthy testimony about the value of the Corvette and its condition. However, the testimony as to Buyer's *use* of the Corvette was fairly limited. The following exchange took place between Buyer and his counsel:

> Q. Just tell me what you did with the Corvette once you purchased the Corvette.
> A. I bought it and used it in my landscaping business.
> Q. Okay. What – explain that to us.
> A. Well, of course, I didn't haul dirt in it, it was a Corvette. I went and looked at jobs in it, went and collected money in it, and went and done proposals in it, things like that.

Buyer also stated that one of his landscaping employees was paid to keep the car clean. In addition, when questioned about his failure to insure the vehicles as required by the contract, Buyer stated that he had attempted to have the Corvette and the dually put on one commercial insurance policy. He also provided documentation to Seller of his application for a commercial insurance policy. For some time, Seller was under the impression that the commercial policy covered the vehicles.

Buyer now contends that his testimony, along with that of his witnesses, demonstrates that the Corvette was a collector's item, and thus, inherently for personal use. He refers to his testimony that he kept the Corvette in excellent condition and had it cleaned on a regular basis. He also notes that he referred to the car as his "baby" and said he loved the car. Also, he testified that he kept the

car in a garage and did not drive it in the rain. According to Buyer, this is "conclusive proof" that the vehicle was purchased for personal use. We disagree.

In searching the extensive transcript of the testimony in this case, we are unable to locate a single reference to an occasion of Buyer driving the car for personal or family use. To the contrary, all of Buyer's testimony relates to his use of the car in his business. When a debtor would benefit if the collateral constituted "consumer goods," the debtor has the burden of proving the nature of the collateral. 10 Ronald A. Anderson, *Anderson on the Uniform Commercial Code* § 9-507:77 (3rd ed. 1999) (citing *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980); *Bundrick v. First Nat'l Bank*, 570 S.W.2d 12, (Tex. Civ. App. 1978)). In borderline cases of classifying collateral, the principal use of the property is determinative. ***In re Frazier***, 16 B.R. 674, 680 (Bankr.M.D.Tenn. 1981). Buyer simply did not produce any evidence that the vehicle was "used or bought for use primarily for personal, family, or household purposes." Tenn. Code Ann. § 47-9-102(a)(23) (2001).

Buyer, on appeal, cites two cases in support of his argument that the Corvette was a "consumer good." First, he notes that just because a vehicle is used for a particular purpose does not necessarily place the vehicle in that particular category, and he cites ***Int'l Harvester Credit Corp. v. Hill***, 496 F.Supp. 329, 333-34 (M.D.Tenn. 1979). We agree with Buyer's statement. We must consider the "primary use" of the collateral in the hands of the debtor. ***Walker***, 673 S.W.2d at 522. In ***Int'l Harvester***, the collateral at issue was a tractor. 496 F.Supp. at 333. The court classified it as equipment, stating that just because an item is personally used does not mean it was for "personal use" under the statute. ***Id.*** at 334. The court also said, "[i]t is the actual use to which the equipment is put and not the occupational status of the owner which is determinative." ***Id.*** at 333. In this case, just because Buyer is a landscaper does not mean he could not use the Corvette for commercial purposes. Buyer himself acknowledged the peculiarity of his using the Corvette in his landscaping business. He explained, "of course, I didn't haul dirt in it, it was a Corvette. I went and looked at jobs in it, went and collected money in it, and went and done proposals in it, things like that." He hauled dirt and materials in the dually. His testimony demonstrates that he had a need for another vehicle in which he could easily travel to potential job sites and interact with customers, and he used the Corvette for those purposes.

Buyer also discusses ***Mallicoat v. Volunteer Fin. & Loan Corp.***, 415 S.W.2d 347 (Tenn. Ct. App. 1966), in which the court briefly discussed the classification of collateral. The court stated:

> There is no proof that [the buyer] was in a business requiring the use of an automobile. He testified he bought it to use in going to and from his place of employment. It is clearly not 'equipment', 'farm products' or 'inventory' as defined by T.C.A. § 47-9-109. We, therefore, hold that it falls within the category of 'consumer goods' as defined by the same Section of the Act.

Id. at 349-50. Buyer now asserts that he used the Corvette in precisely the same way – to travel to and from his employment. He argues that he was not in a business to need a Corvette. However, as we have already discussed, Buyer's testimony revealed that he used the Corvette for various

commercial reasons. In our opinion, Buyer's occupation would qualify as a business requiring the use of an automobile. He did not merely drive to and from an office everyday with no occasion to use the car for business reasons. Although he may not have needed a Corvette, specifically, he needed some type of vehicle and chose to purchase a Corvette. If Buyer had used another truck or a less expensive car and testified that he used it for these same commercial purposes, the vehicle would clearly not be classified as a consumer good. We will not accept Buyer's argument on appeal that the Corvette is "inherently" a collector's item, and therefore for personal use, when the evidence he presented at trial does not support that conclusion.

In sum, we conclude that the evidence presented in this case does not support a finding that the Corvette was purchased in a "consumer goods" transaction. Therefore, the statutory penalty available in consumer transactions was awarded in error. We vacate the trial court's award of $7,777 to Buyer regarding the Corvette. We find it unnecessary to address the issue Seller presented regarding the trial court's alleged error in calculating the award.

2. Surplus Following Sale of the Corvette

The trial judge awarded damages to Buyer for Seller's wrongful repossession of the Corvette. The damage award allowed Buyer to recover his equity in the collateral. The judge calculated the award as the reasonable value of the collateral at the time of the wrongful repossession less the amount of debt owed on the car ($17,500 value – $7,624.61 owed = $9,875.39 surplus). The jury had determined the fair market value of the Corvette was $17,500. Seller argues on appeal that the jury's determination of the value of the car was not supported by the evidence. The judge determined the amount owed from the balance shown on Buyer's last payment receipt.[8] He then calculated the surplus of $9,875.39 and awarded that amount to Buyer.

However, the judge also reduced Seller's deficiency award by offsetting it with a $4,500 "surplus." Although the final order does not explain the court's calculations, the judge discussed the damage awards after the jury returned its answers to the interrogatories. The court stated, "[o]n the counterclaim, I award [Seller] $6,328.14, *but I set off $4,500 to that, which is a surplus on the Corvette*, whatever that figure is. [W]hich is only going to be around, off the top of my head, $1,800" awarded to Seller. (Emphasis added). So, in sum, the court awarded Buyer a $9,875.39 surplus in addition to the $4,500 surplus it credited against Seller's deficiency award. It appears that the $4,500 surplus figure came from Seller's testimony that, after the sale of the Corvette, he had retained approximately $4,500 "surplus" beyond what he was owed ($12,500 sale price – approx. $7,900 owed = approx. $4500).

[8] As previously discussed, the parties disputed whether the receipts displayed the true amount owed on the vehicles because the figures included the entire interest charge. However, on appeal, neither party challenged the trial court's use of this figure in his calculation of the surplus for the car.

First, we address Seller's argument that the jury's valuation of the Corvette's fair market value was not supported by the testimony at trial. Seller had contended that the fair market value equaled the wholesale price he received, $12,500.

As previously noted, this Court will set aside a jury's findings of fact only if there is no material evidence to support the verdict. Tenn. R. App. P. 13(d). We will take the strongest legitimate view of all the evidence in favor of the verdict, assume the truth of all that tends to support it, allow all reasonable inferences to sustain the verdict, and discard all to the contrary. ***Crabtree***, 575 S.W.2d at 5. We will not reweigh the evidence, nor will we decide where the preponderance of the evidence lies. ***Id.***

Having examined the record, we conclude that the jury's determination of the car's fair market value is supported by material evidence. At trial, a local car salesman testified that, in his opinion, the Corvette was worth around $16,000 to $18,000 at the time of repossession. He stated that he had been in the car business for approximately twenty years, he regularly saw Corvettes sold at auction, and he saw the Corvette at issue after it was repossessed. Although Seller claimed that the Corvette was in poor condition when repossessed, Buyer and his girlfriend testified that it was in excellent condition. Buyer also stated his own opinion that the Corvette was valued between $16,000 and $18,000. This evidence, if believed by the jury, would support a finding that the Corvette's fair market value was $17,500 at the time of repossession. Therefore, the trial judge properly included this figure in his damage calculation.

Next, we will address the proper formula for calculating damages for wrongful repossession.[9] Seller claims in his brief that the correct measure of damages is the difference between the "sale price" and the balance still owed on the car ($12,500 sale price – $7,624.61 amount owed = $4,875.39 surplus).[10] It is not clear from Seller's argument whether he is again stating that the $12,500 sales price should have established the fair market value of the vehicle, or whether he claims that a different formula should have been used in calculating damages. We find it necessary to address the proper measure of damages because of the various calculations used by the parties and

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[9] It is important to note that Buyer did not challenge the commercial reasonableness of the *sale* following repossession. When a sale following repossession is determined to be commercially unreasonable, the proper measure of damages is "the excess of the fair market value at the time of repossession over *the greater of* the disposition sale price of the collateral *or* the indebtedness due on the collateral." ***Walker v. Assoc. Commercial Corp.***, 673 S.W.2d 517, 523 (Tenn. Ct. App. 1983) (emphasis added); ***See also*** 8 Tenn. Practice: Tenn. Pattern Jury Instructions - Civil § 14.71 comment (6th ed. 2006) (stating that the above mentioned measure of damages applies when the secured party fails to conduct a commercially reasonable sale, regardless of whether the repossession itself was wrongful).

[10] Seller also states in his brief that the trial court had calculated damages of $5,000 by subtracting the sale price from the fair market value ($17,500 value – $12,500 sale price = $5000 surplus). This appears to be a misstatement of the facts as we can find no such award in the record, and Seller does not cite to the record when mentioning the award. As previously noted, the court actually calculated the surplus damage award by subtracting the amount owed from the value of the car ($17,500 value – $7,624.61 owed = $9,875.39 surplus). The judge also credited a "surplus" to Buyer by subtracting the amount owed from the actual sales price, ($12,500 sale price – approx. $7,900 owed = approx. $4500). Neither of these calculations corresponds to the formula Seller claims the court used.

the trial court. Again, we note that the trial court's conclusions of law are reviewed *de novo* with no presumption of correctness. ***Union Carbide Corp.***, 854 S.W.2d at 91.

A creditor who wrongfully repossesses property may be held liable for conversion damages. ***See Harris Truck & Trailer Sales v. Foote***, 58 Tenn. App. 710, 719, 436 S.W.2d 460, 464 (Tenn. Ct. App.1968); 68A Am. Jur. 2d *Secured Transactions* § 583 (2d ed. 2006); Robert M. Lloyd, *Wrongful Repossession in Tennessee*, 65 Tenn. L. Rev. 761, 789 (1998). When the converter is a secured party, the measure of damages is the value of the vehicle at the time of the wrongful repossession, less the amount owing thereon. ***Harris***, 58 Tenn. App. at 719, 436 S.W.2d at 464; Lloyd, *supra*, at 790. This method of calculation gives Buyer the benefit of receiving the fair market value of the car rather than the price Seller received from selling it wholesale. Before trial, the judge acknowledged that this measure of damages was applicable to this case. The first surplus award to Buyer was calculated using this formula ($17,500 value – $7,624.61 owed = $9,875.39 surplus). We conclude that this was the proper measure of damages to be awarded to Buyer for wrongful repossession. However, the $4,500 "surplus" should not have been additionally credited on Buyer's behalf. In effect, Buyer was awarded damages based on what Seller *did* receive from the sale beyond what he was owed and also what Seller *could have* received from the sale beyond what he was owed. The only "surplus" that should have been awarded to Buyer was the $9,875.39 based on the value of the vehicle at the time of repossession, less the amount owing thereon. This award properly compensated Buyer for his equity in the car at the time of the wrongful repossession.

3. Deficiency Following Sale of the Dually

Seller also challenges the jury's valuation of the deficiency remaining on the truck. The jury was asked to determine the deficiency as: the amount still owed at the time of repossession, plus the cost of repossession, plus the cost of repairs, less the amount for which the truck was sold. The jury returned the interrogatory with a figure of $6,328.14 with no explanation of its calculations. Seller argues that the jury's figure is not supported by the weight of the evidence and the correct amount should be $6,967.38.

Buyer explains the jury's lower figure as taking into account the parties' dispute as to the amount Buyer still owed at the time of repossession. According to Buyer, the jury could have agreed that the amount he owed was less than Seller had claimed. When Buyer made his last payment on the dually, his payment receipt showed a remaining balance of $13,380.60 on the loan. At trial, Seller testified that the "payoff" amount owed should equal the balance shown on that receipt. Buyer, on the other hand, claimed that the payoff amount should be lower than what was shown on the receipts because the vehicles were repossessed early. He argued that he should not be required to pay the extra interest if he did not pay on the vehicle for the entire life of the loan. Buyer's counsel later questioned Seller on whether the entire finance charge had been included in Seller's figures. He introduced Seller's deposition testimony in which Seller had stated that the amount listed on the receipts did include the finance charge.

Again, if there is any material evidence to support the jury's decision, we must affirm the judgment. Tenn. R. App. P. 13(d). The amount of damages rests in the sound discretion of the jury, and when approved by the trial judge, the award will not be disturbed on appeal unless a violation of discretion by the jury is shown. ***Sholodge Franchise Systems, Inc. v. McKibbon Bros., Inc.***, 919 S.W.2d 36, 42-43 (Tenn. Ct. App. 1995) (citing *Southern R.R. Co. v. Deakins*, 107 Tenn. 522, 64 S.W. 477 (1901); *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125 (Tenn.1980); *D.M. Rose & Co. v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947); *Strother v. Lane*, 554 S.W.2d 631 (Tenn. Ct. App. 1976)). A jury's damage verdict need not be reviewed for mathematical precision or certainty. ***Hunter v. Ura***, 163 S.W.3d 686, 705 (Tenn. 2005). When there is substantial evidence in the record, and reasonable inferences may be drawn from that evidence, mathematical certainty is not required. ***Cummins v. Brodie***, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983).

In our view, the jury's valuation of the deficiency is supported by material evidence and within the reasonable range of damages supported by the record. In weighing the evidence and assessing the witnesses' credibility, the jury could have determined that Buyer did not still owe the full amount claimed by Seller. Alternatively, the jury could have decided that all of the repairs Seller had performed following the repossession were not truly necessary. Either way, the jury's damage award was not grossly disproportionate to the amount claimed by Seller so that we would consider it an abuse of the jury's discretion. Although it is unclear what precise amounts were used in the jury's calculation, as we have noted, we need not review the award for mathematical certainty.

4. Total Damages

Because we have vacated the consumer penalty award and modified the surplus award to Buyer, we will explain the correct amount of total damages to be awarded.[11] There is sufficient proof in the record to enable us to calculate the damages. Thus, we need not require the parties or the trial court to go to the time and expense of doing so on remand. When the trial court issued its final order and awarded damages, the court listed the jury's findings and its awards as follows, in pertinent part:

> . . . the jury found that by the preponderance of the evidence as follows:
>
> 1. [Seller] failed to provide written notice of the sale of the 1997 Chevrolet Silverado pick up truck to [Buyer].
> 2. [Seller] failed to provide written notice of the sale of the 1995 Chevrolet Corvette to [Buyer].
> 3. [Seller] wrongfully repossessed the 1995 Chevrolet Corvette;
> 4. The 1995 Chevrolet Corvette had the fair market value of seventeen thousand and five hundred dollars ($17,500) at the time of the repossession;

[11] Seller claims that the total amount of damages should be calculated by taking the surplus he owes to Buyer and subtracting the deficiency that Buyer owes him.

5. The deficiency on the 1997 Chevrolet Silverado pick up truck is six thousand three hundred and twenty-eight dollars and fourteen cents (*$6,328.14*).

Wherefore, it appearing to the Court the said verdict of the jury is appropriate and was unanimous;

It is therefore, ordered, adjudged and decreed that a judgment is hereby awarded and entered in favor of [Buyer] against [Seller] in the amounts as follows:

1. $7,777 for statutory damages pursuant to T.C.A. § 47-9-625 for failure to provide proper notice of the sale of the 1995 Chevrolet Corvette;
2. $4,385 for statutory damages pursuant to T.C.A. § 47-9-625 for failure to provide proper notice of the sale of the 1997 Chevrolet Silverado pick up truck;
3. *$9,875.39 for the surplus* on the 1995 Chevrolet Corvette;
4. Less *$1,828.14 for the deficiency* on the 1997 Chevrolet Silverado pick up truck *minus the surplus* [of $4500] on the Chevrolet Corvette.

All in an amount equal to twenty thousand and two hundred and nine dollars and twenty-five cents ($20,209.25).

(emphasis added). On Seller's motion to alter or amend, the trial court withdrew the $4,385 consumer penalty for selling the truck without notice. We have vacated the consumer penalty of $7,777 for sale of the car. We affirm the $9,875.39 surplus award to Buyer representing damages for wrongful repossession of the car. However, the full amount of the deficiency owed to Seller, $6,328.14, should be awarded to him without the offset for an additional surplus.

The surplus and deficiency awards are affirmed as modified. In sum, we conclude that the remaining award of $9,875.39 to Buyer should be offset against the deficiency award of $6,328.14 to Seller, with a total award remaining to Buyer of $3,547.25.

D. The Tennessee Consumer Protection Act

On appeal, Buyer claims that the trial court erred in directing a verdict on his claim for violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq*. The Act provides that "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices . . . ." Tenn. Code Ann. § 47-18-104(a) (2005). So in order for the Act to apply, the unfair or deceptive acts must affect trade or commerce, as defined by the Act. In ***Pursell v. First Am. Nat'l Bank***, 937 S.W.2d 838, 842 (Tenn. 1996), the Supreme Court of Tennessee concluded that our Consumer Protection Act did not apply to a bank's actions with regard to repossession of collateral. In the Court's opinion, the bank's actions during repossession did not affect the conduct of any "trade or commerce." ***Id.*** at 839. However, Buyer argues that this case is distinguishable from *Pursell* because it involves a repossession arising from a buyer-seller relationship rather than by a third-party creditor such as a bank.

Under the Act, "trade" or "commerce" is defined as the "advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities, or things of value wherever situated." Tenn. Code Ann. § 47-18-103(11) (2001). Buyer argues that, in essence, the transaction at issue here involves a sale, and the repossession only makes up part of Seller's deceptive actions. He states that, in short, Seller sold Buyer a vehicle, "accepted payments of over $22,000 over a three and a half year period, [and] stole it from him via wrongful repossession . . . ." He compares his situation to one in which a seller sells a vehicle outright and then steals it back after some time. He also cites certain statutory language requiring a liberal construction of the Act to provide a means of "maintaining ethical standards of dealing . . . to the end that good faith dealings between buyers and sellers *at all levels of commerce* be had in this state." Tenn. Code Ann. § 47-18-102(4) (2001) (emphasis added).

In *Pursell*, the Court acknowledged the provisions of the Act which require a liberal construction to protect against unfair or deceptive acts or practices. 937 S.W.2d at 841. However, the Court concluded that the parameters of the Act do not extend to every action of every business in the state. ***Id.*** The Court further noted, "[t]hough the definitions of 'trade or commerce' contained within the Tennessee Consumer Protection Act are broad, they do not extend to this dispute, which arose over repossession of the collateral securing the loan." ***Id.*** at 842. The repossession did not affect the "advertising, offering for sale, lease or rental, or distribution of any goods, services, or property . . . ." ***Id.*** at 841. The Court proceeded to confine its holding to the facts and circumstances of that case and did not generally exempt all banking activities from the coverage of the Act. ***Id.*** at 842.

The case at bar is analogous to *Pursell*, and we decline the opportunity to extend the coverage of the Consumer Protection Act to this repossession. In *Pursell*, the debtor argued that, in effect, every action of an entity engaged in business affects trade or commerce, and, if unfair or deceptive, gives rise to a claim under the Act. ***Id.*** at 841. The Court acknowledged that other banking activities may affect trade or commerce and was careful to point out that it was not exempting those activities from the coverage of the Act. ***Id.*** at 842. However, by considering the natural and ordinary meaning of the language of the Act, the Court concluded that the definitions of "trade or commerce" did not extend to a dispute arising over repossession of collateral securing a loan. ***Id.*** Likewise, we conclude that a plain reading of the definition of "trade" or "commerce" does not extend to this situation involving repossession. The acts complained of do not affect the advertising, offering for sale, lease, rental, or distribution of any goods, services, or property as described in Tenn. Code Ann. § 47-18-103(11) (2001). Although other activities in Seller's business may affect trade or commerce, the Act does not then automatically apply to any other actions taken, even if unfair or deceptive.

Only a few states have allowed recovery under state consumer protection acts for wrongful repossessions. Robert M. Lloyd, *Wrongful Repossession in Tennessee*, 65 Tenn. L. Rev. 761, 797 (1998) (mentioning *Entriken v. Motor Coach Fed. Credit Union*, 845 P.2d 93, 98 (Mont. 1992); *Sherwood v. Bellevue Dodge, Inc.*, 669 P.2d 1258, 1263-64 (Wash. Ct. App. 1983), modified, 676 P.2d 557 (Wash. Ct. App. 1984)). It has been suggested that the drafters of our Consumer Protection

Act may have intentionally exempted repossessions from the coverage of the Act. ***Id.*** at 798. It is possible they believed that repossessors are entitled to use deceptive practices that would be unlawful under the Act in other contexts. ***Id.*** For example, after default, a secured party may take possession of collateral without judicial process if he can do so without a breach of the peace. Tenn. Code Ann. § 47-9-609 (2001). The secured party is not required to give prior notice to the debtor before repossessing the collateral, unless their contract provides otherwise, because doing so would allow an unscrupulous debtor to hide or dispose of collateral and avoid rightful repossession by a secured party. 11 Ronald A. Anderson, *Anderson on the Uniform Commercial Code* [Rev] § 9-609:5 (3rd ed. 1999). Although he cannot use or threaten violence or force entry into closed premises, ***Davenport v. Chrysler Credit Corp.***, 818 S.W.2d 23, 29-30 (Tenn. Ct. App. 1991), if the secured party takes property from a driveway or open area, even though he is technically trespassing, it will not generally, by itself, constitute a breach of the peace. Anderson, *supra*, [Rev] § 9-609:6. However, some may perceive this type of action by a repossessor as "deceptive" or "unfair."

Although the term "deceptive act or practice" is not defined by the Act, a non-exclusive, illustrative list of deceptive acts or practices affecting trade or commerce is provided. Tenn. Code Ann. § 47-18-104(b) (1)-(40) (2005). Three more specific illustrations of deceptive acts affecting trade or commerce were added during the most recent legislative session. ***See*** 2006 Tenn. Pub. Ch. 628; 2006 Tenn. Pub. Ch. 671; 2006 Tenn. Pub. Ch. 746. None of the specific examples listed deal with repossessions. If, after *Pursell*, the General Assembly wished to clarify or express its intention that the Tennessee Consumer Protection Act would cover repossessions, it surely would have responded with a specific illustration addressing repossessions.

The self-help procedures provided in repossession situations are the product of a careful balancing of the interests of secured parties and debtors. ***Davenport***, 818 S.W.2d at 30. "On one hand, secured creditors have a legitimate interest in obtaining possession of collateral without resorting to expensive and sometimes cumbersome judicial procedures. On the other hand, debtors have a legitimate interest in being free from unwarranted invasions of their property and privacy interests." ***Id.*** (citing *Riley State Bank v. Spillman*, 750 P.2d 1024, 1029 (Kan. 1988); *General Elec. Credit Corp. v. Timbrook*, 291 S.E.2d 383, 385 (W.Va. 1982); *Salisbury Livestock Co. v. Colo. Cent. Credit Union*, 793 P.2d 470, 475 (Wyo. 1990)). From our reading of the Consumer Protection Act, it does not cover repossessions. Repossessions do not affect the "advertising, offering for sale, lease, rental, or distribution of any goods, services, or property." Tenn. Code Ann. § 47-18-103(11) (2001). We do not wish to upset the balancing of the interests of secured creditors and debtors which the legislature has achieved. Therefore, we will not extend the Tennessee Consumer Protection Act to cover repossessions without a clear expression of our legislature's intention to cover these transactions.

V. CONCLUSION

For the aforementioned reasons, we conclude that the trial court properly overruled Seller's motion for a directed verdict on the issue of wrongful repossession of the Corvette, and we find material evidence in the record to support the jury's finding that no notices were sent prior to sale

of the vehicles. Regarding damages, we find no evidence in the record to support a finding that the transaction at issue involved "consumer goods," and therefore we vacate the trial court's $7,777 award of the statutory penalty provided in consumer transactions. We do find evidence supporting the jury's valuation of the fair market value of the Corvette, and we affirm the trial court's award of $9,875.39 to Buyer for the surplus. We also find material evidence to support the jury's finding that $6,328.14 existed as a deficiency owed on the truck, and that full amount should have been awarded to Seller. In sum, we will offset the two awards for a total award of $3,547.25 to be awarded to Buyer, plus the discretionary costs he was awarded below which the parties have not appealed. The judgment of the circuit court is affirmed as modified.

Cost of this appeal are taxed one-half to Appellant, Rick Bates d/b/a RB Auto Sales, and his surety, and one-half to Appellee, Michael Davenport, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE